UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

NEBRASKALAND, INC.

and

Case No. 2-CA-39996

LOCAL 342, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

ACTING GENERAL COUNSEL'S EXCEPTIONS AND SUPPORTING BRIEF TO THE BOARD

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Dated at New York, New York
this 28th day of December, 2011

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I. STATEMENT OF THE CASE

On September 21, 2011, a hearing on the Consolidated Complaint in Case Nos. 2-CA-39715 and 2-CA-39996 (the Complaint - GCX 1q) opened before Administrative Law Judge Steven Davis (the ALJ). At that hearing, the parties signed a Formal Settlement Stipulation (the Formal Settlement) in Case No. 2-CA-39715 which was approved by the ALJ (GCX 2).[1] Pursuant to the Formal Settlement, Respondent withdrew its Answer to the Complaint (the Answer - GCX 1s) except for Paragraph 13 and the Fourth Affirmative Defense, both of which relate to Case No. 2-CA-39996. The ALJ then issued an Order that severed Case No. 2-CA-39715 from Case No. 2-CA-39996 and retained the latter case for further processing (GCX 3). He then admitted certain documents pertaining to Case No. 2-CA-39996 into evidence and closed the record (TR 7 – 9, RX 1 and 2).

On September 28, 2011, Acting General Counsel filed a Motion to Reopen the Record to Admit Evidence (GCX 6). On October 17, 2011, the ALJ granted the Motion through an Order Reopening the Record and Receiving Evidence (GCX 7).[2] On October 24, 2011, the ALJ issued an Order Closing the Record which he refers to in his Decision (the ALJD) as General Counsel's Exhibit 8.

II. STATEMENT OF EXCEPTIONS

Acting General Counsel contends the ALJ erred by:

1. inadvertently failing to receive the Order Closing the Record as General Counsel's Exhibit 8;

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[1] On November 21, 2011, the Board approved the Formal Settlement and issued a Decision and Order pursuant to its provisions.

[2] Acting General Counsel had asked to admit the collective bargaining agreement between the parties and sample dues check-off cards. In his Order, the ALJ received those documents as GCX 4 and 5, respectively.

2. finding that Respondent denied knowledge or information concerning the filing and service of the charge (ALJD 1, fn 1);

3. finding that Respondent denied knowledge or information concerning the labor organization status of the Union (ALJD 2);

4. finding that there was no evidence that the parties engaged in bargaining after their contract expired (ALJ 4, fn 3);

5. finding that the union security clause in the instant case may be considered to have been properly linked, consistent with Bethlehem Steel, 136 NLRB 1500 (1962), with the dues checkoff provision (ALJD 5);

6. finding that the Bethlehem Board did not rely on the fact that there was language in the dues checkoff provisions of the contract limiting the authority to deduct dues to the duration of the contract when it found that the Employer could cease dues checkoff (ALJD 5);

7. finding that Respondent's unilateral cessation of dues checkoff in April 2010 did not violate Section 8(a)(1) and (5) of the Act (ALJD 5)[3] and, therefore, failing to order a remedy;

8. dismissing the Complaint (ALJD 5).

III. THE FACTS

The facts in this case are undisputed. Respondent and Local 342, United Food and Commercial Workers International Union (the Union) were parties to a collective bargaining agreement (cba) effective from July 1, 2005 to October 31, 2009 (ALJD 2,

[3] In his decision, the ALJ stated that Acting General Counsel argued that Respondent forfeited the right to cease dues contributions because it continued to deduct such contributions after the cba expired. Acting General Counsel did not make this argument. Rather, it was Respondent that addressed this issue in its brief.

GCX 4). Article 3 of the cba provides for union security at sections A and B and for dues checkoff at sections C and D.

Pursuant to the dues checkoff provision, Respondent agreed to deduct dues and other authorized amounts from the wages of employees who filed a proper "deduction card" and to remit those monies to the Union. The provision does not contain language addressing the duration of the checkoff. By virtue of the deduction card referred to in Article 3 (GCX 5), the employee signing authorizes Respondent to deduct dues, initiation fees, and authorized assessments certified by the Union from his wages and remit such monies to the Union. Mirroring the language of Section 302(c)(4) of the statute, the authorization is irrevocable for a period of one year from date of execution or until the termination date of the contract, whichever occurs sooner. Additionally, the authorization card states that it is irrevocable from year to year thereafter, unless between ten and twenty days prior to the end of any subsequent yearly period, the employee gives the employer and the Union written notice by certified mail of such revocation. It further states that the authorization is not contingent on present or future membership in the Union.

While negotiations for a successor collective bargaining agreement were proceeding, Respondent, by letter dated April 1, 2010, informed the Union that it would discontinue checking off dues as of "the first payroll period of April (checks issued April 8 and 9)." Respondent then implemented its decision on or about April 8 (GCX 1q – paragraph 12a and 13a, RX 1).[4] The parties stipulated that the April 1 letter was the first

[4] Respondent's Answer specified April 8, 2010 as the approximate date on which Respondent discontinued checkoff (GCX 1s – paragraph 13a).

notice Respondent gave the Union that it would be discontinuing dues checkoff (TR 9, ALJD 3).

IV. ARGUMENT

POINT I. The Order Closing the Record should be received into evidence as General Counsel's Exhibit 8.

After reopening the record to receive evidence, the ALJ issued an Order Closing the Record. Although his decision indicates that he received that Order into evidence (ALJD 1, fn 2), he inadvertently failed to do so. Thus, there is no record that the case has been closed. Acting General Counsel, therefore, asks that the Board receive the ALJ's Order Closing the Record into evidence as General Counsel's Exhibit 8.

POINT II. The final record does not indicate that Respondent denied knowledge or information concerning the filing and service of the charge.

Although the ALJ correctly found that the formal papers established that the charge was filed and served as set forth in the Complaint (GCX 1q – paragraph 1), he found that Respondent's Answer denied knowledge or information concerning the filing and service of the charge (ALJD 1, fn 1). That part of the Answer (GCX 1s – paragraph 1), however, was withdrawn pursuant to the Formal Settlement (GCX 2 – paragraph IV(3)).[5] Thus, the Complaint allegations regarding the filing and service of the charges are unanswered and should be deemed admitted pursuant to the National Labor Relations Board Rules and Regulations, Section 120.20. Acting General Counsel, therefore, asks that the Board find that there is no dispute with regard to the filing and service of the charge.

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[5] See FN 1.

POINT III. The final record does not indicate that Respondent denied knowledge or information concerning the labor organization status of the Union.

Although the ALJ correctly found that the Union was a labor organization within the meaning of Section 2(5) of the Act, he found that Respondent denied knowledge or information concerning the labor organization status of the Union (ALJD 2). That part of the Answer (GCX 1s – paragraph 4), however, was withdrawn pursuant to the Formal Settlement in which, in addition to withdrawing its answer concerning labor organization status, Respondent admitted the labor organization status of the Union (GCX 2 – paragraphs III and IV(3)).[6] Thus, the Complaint allegations regarding labor organization status (GCX 1q – paragraph 4) are unanswered and should be deemed admitted pursuant to the National Labor Relations Board Rules and Regulations, Section 120.20 as well as pursuant to the admission in the Formal Settlement. Acting General Counsel, therefore, asks that the Board find that there is no dispute with regard to the labor organization status of the Union.

POINT IV There is evidence that the parties engaged in bargaining after their contract expired.

The ALJ stated that there was no evidence that the parties engaged in bargaining after their contract expired (ALJD 4, fn 3). This is incorrect. Paragraph 12(a) of the Complaint (GCX 1q) alleges that at "various times during the months of September 2009 through February 2011, Respondent and the Union met for the purposes of negotiating a successor collective bargaining agreement to the agreement described above in paragraph 8(b)," i.e., the cba. As the Formal Settlement withdrew the Answer with regard to this

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[6] See FN 1.

allegation (GCX 2 – paragraph IV(3)),[7] it is unanswered and thus, deemed admitted pursuant to the National Labor Relations Board Rules and Regulations, Section 120.20. Further, even had it not been withdrawn, the Answer admitted allegations of Paragraph 12(a) of the Complaint (GCX 1s – paragraph 12(a)). Acting General Counsel, therefore, asks that the Board find that the parties were engaged in collective bargaining during the months of September 2009 through February 2011.

POINT V Respondent violated Section 8(a)(1) and (5) by unilaterally ceasing dues checkoff.

While conceding that the ALJ was bound by Board precedent in deciding the instant case (ALJD 4), Acting General Counsel respectfully argues that Respondent's unilateral cessation of dues deductions after the cba expired is an unfair labor practice. To the extent that Bethlehem Steel Company, 136 NLRB 1500 (1962), holds to the contrary, Acting General Counsel asks that it be overruled because no principled rationale exists for excluding dues checkoff from the unilateral change rule.

A. The law regarding unilateral changes in terms or conditions of employment

The duty to bargain collectively pursuant to Section 8(a)(5) of the Act is defined by Section 8(d) as requiring an employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. Thus, once a term or condition of employment has been established, it cannot be unilaterally changed as that would be a "circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat

[7] See FN 1.

refusal (to negotiate)," NLRB v. Katz, 369 U.S. 736, 743, 747 (1962); [8] Litton v. NLRB, 501 U.S. 190, 198 (1991) ("an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment").[9] Indeed, unilateral changes without bargaining "strike at the heart" of a union's ability to effectively represent unit employees. "There is no clearer or more effective way" to erode a Union's ability to bargain for the employees it represents than for an employer to make such changes without consultation with the union. The Little Rock Downtowner, Inc., 168 NLRB 107, 108 (1967), enf'd. 414 F2d 1084 (8th Cir. 1969). As the Supreme Court said in Litton at 198, "...it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations."

Although the unilateral changes addressed in Katz took place during bargaining for an initial contract, the Supreme Court extended the Katz doctrine forbidding unilateral changes absent notice and bargaining to situations where an existing agreement has expired and negotiations on a successor agreement have not been completed. Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 544 fn 6 (1988), affirming the decision of the Ninth Circuit, 779 F.2d 497 (9th Cir. 1985), that "(f)reezing the status quo ante after a collective

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[8] There need not be a failure of subjective good faith to find a violation of the duty to bargain since there can be no inquiry into good faith if a party has refused to negotiate any subject within 8(d). Katz at 743.

[9] Even before the Supreme Court decided Katz, the Board had found a unilateral change in working conditions to be violative of Section 8(a)(5). Bonham Cotton Mills, Inc., 121 NLRB 1235, 1236 (1958), enf'd. 289 F.2d 903 (5th Cir. 1961). See also, decision of the Fifth Circuit in Armstrong Cork Co. v. National Labor Relations Board, 211 F.2d 843, 847 (5th Cir. 1954) ("Good faith compliance with Sections 8(a)(5) and (1) of the Act presupposes that an employer will not alter existing 'conditions of employment' without first consulting the exclusive bargaining representative selected by his employees, and granting it an opportunity to negotiate on any proposed changes.")

agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conductive to serious negotiations on a new contract. Thus, an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining..."

B. The current law regarding checkoff after a contract expires

In Bethlehem Steel, 136 NLRB 1500, 1502 (1962), the Board reaffirmed long-standing precedent that checkoff related to wages, hours, and other terms and conditions of employment within the meaning of 8(d) and was, therefore, a mandatory subject of bargaining. See, U.S. Gypsum, 94 NLRB 112, fn 7 (1951) (finding that the language and legislative history of the 1947 amendments show that "Congress intended that the bargaining obligation contained in Section 8(a)(5) should apply to checkoff"). Nevertheless, the Bethlehem Board found that checkoff was an exception to the unilateral change rule as described above in Section A *supra* and held that an employer may act unilaterally with respect to checkoff after the expiration of a contract because checkoff implements the union security provision of the contract and thus, like union security, which does not survive the expiration of the contract pursuant to Section 8(a)(3), check-off is created by the contract and cannot survive it. Id. The Board also found that the language of the contract in Bethlehem linked the right to checkoff with the duration of the contract.[10] Id. ("The very language of the contract links Respondent's checkoff obligation to the Union with the duration of the contracts.")[11]

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[10] That language read "...the Company will, beginning the month in which this Agreement is signed and *so long as this Agreement shall remain in effect*, deduct from the pay of such Employee each month...his periodic union dues for that month." Id. (italics added).

[11] The ALJ was, therefore, incorrect in finding that the Bethlehem Board did not rely on the fact that there was language in the dues checkoff provisions of the contract limiting the authority to deduct dues to the duration of the contract when it found that the employer could cease dues checkoff (ALJD 5).

In Hudson Chemical Co., 258 NLRB 152, 157 (1981), the Board found that Section 302(c)(4) of the Act also did not allow checkoff to survive expiration of a collective bargaining agreement. Although Section 302 generally bars an employer from paying money to a labor organization, Section 302(c)(4) provides an exemption for dues checkoff where "the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." The Hudson Board read this language to mean that when the agreement expired, so did the checkoff authorization.

The most recent case addressing checkoff at contract expiration is Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (LJEB III), 657 F.3d 865 (9th Cir. 2011). The series of cases leading up to LJEB III, concern checkoff in right-to-work states. The history of those cases is as follows.

In Hacienda Hotel, Inc. Gaming Corp. (Hacienda I), 331 NLRB 665 (2000), the Board dismissed a union's allegation that the employer violated the Act by unilaterally ceasing dues check off after contract termination relying on the Bethlehem Steel holding that a dues checkoff clause expires with the contract. After the union filed a petition for review, the Ninth Circuit, in Local Joint Executive Board of Las Vegas v. NLRB (LJEB I), 309 F.3d 578, 582 (9th Cir. 2002), vacated the Board's ruling. The Court noted that Bethlehem Steel concerned a case where there was a union security clause in effect and the Board in Hacienda I had not articulated a reason to extend the Bethlehem rule to situations where there was no union security clause. The Court, therefore, remanded the case for the Board to articulate a reasoned explanation for its ruling or adopt a different

rule and present a reasoned explanation to support it stating that although a Board rule may become well established through repetition, it may come to stand for a legal rule only through reasoned decision making. Id. at 583.

On remand, the Board, in Hacienda Hotel, Inc. Gaming Corp. (Hacienda II), 351 NLRB 504 (2007), did not rely on the rule articulated in its original decision. Rather, they found that the language in the checkoff provision of the collective bargaining agreement whereby the employer agreed to deduct dues during the term of the agreement[12] constituted a waiver of the right to continue dues checkoff after contract expiration. After the union filed a new petition for review, the Ninth Circuit, in Local Joint Executive Board of Las Vegas v. NLRB (LJEB II), 540 F.3d 1072, 1082 (9th Cir. 2008), again vacated the Board's decision. They found that the high standard for clear and unmistakable waiver was not met, remanded the case to the Board a second time, and again ordered the Board to articulate a reasoned explanation for its ruling in Hacienda I or adopt a different rule and present a reasoned explanation to support it.

The Board, after the second remand, could not agree on a reasoned decision for whether or not to exclude checkoff from the unilateral change rule and therefore, as it believed it had to, let stand the existing rule. Hacienda Hotel, Inc. Gaming Corp. (Hacienda III), 355 NLRB No. 154 (2010). This brings us to LJEB III which issued after the union's third petition for review.

In LJEB III, the Ninth Circuit found that the Board breached its duty to provide a rational and logical explanation for its ruling in Hacienda I (or adopt a different rule with a reasoned explanation) and, therefore, vacated the Board's ruling in Hacienda II as arbitrary and capricious. The Court determined that another remand would be

[12] The language is similar to that found in Bethlehem Steel.

inappropriate and decided that it should address the question of whether dues checkoff in right-to-work states is subject to unilateral change. The Court found that in a right-to-work state, the rationale of Bethlehem Steel loses its force as dues checkoff could not possibly implement union security.[13] Thus, there was no justification to carve out an exception to the unilateral change doctrine for dues checkoff in the absence of union security. They further stated that nothing in the NLRA limited the duration of dues checkoff to the duration of a collective bargaining agreement noting specifically that the revocation requirements in 304(c)(4) would be surplusage if dues checkoff automatically terminated upon expiration of the contract, and statutes should not be construed to make surplusage of any provision. Id. at p. 8. In sum, the employer's unilateral termination of checkoff was a failure to bargain.

In view of the above, it is clear that, to date, the Board has not, as requested by the Ninth Circuit, issued a decision articulating a reasoned analysis for excluding checkoff from the unilateral change rule in a right-to-work state As will be shown below, there is no reason to exclude checkoff from that rule anywhere.

C. Bethlehem Steel as extended by Hudson Chemical Co. should be overruled

Mandatory subjects of bargaining incorporated in a collective bargaining agreement will not survive the expiration of that agreement if either (1) the statute does not permit such provisions to survive, e.g., Section 8(a)(3) which only permits a union security clause when a contract is in effect, or (2) such provisions compel a party to surrender a statutory right, e.g., absent agreement of the parties, arbitration does not survive contract expiration because an employer who is not subject to the provisions of a

[13] The Court specifically did not express an opinion on the wisdom of the Bethlehem Steel rule in situations where union security existed. Id. at p. 8.

collective bargaining agreement retains the right to make a final decision on matters such as discipline and discharge. Litton at 199 – 200;[14] See, Roosevelt Memorial Medical Center and American Federation of State, County and Municipal Employees, Montana State Council 9, 348 NLRB 1016 (2006) (surrender of a statutory right is contract bound). The contractual terms that do survive the expiration of a collective bargaining agreement do so not because they are in force by virtue of the contract but because they are in force by virtue of Section 8(a)(5) of the NLRA, i.e., those terms are "imposed by law, at least so far as there is no unilateral right to change them" Litton at 206.[15]

Although the Litton court mentioned that checkoff did not survive contract expiration based on Section 302(c)(4) of the Act, Acting General Counsel will show that a checkoff clause such as the one in the instant case does not comport with the two bases set forth in Litton for allowing the expiration of a contractual provision, i.e., the language of the statute or the surrender of a statutory right. In short, there is no reasoned explanation for excluding checkoff from the unilateral change rule.

1. The statutory language does not preclude checkoff from surviving contract expiration.

As the contracts in the Hacienda/LJEB cases arose in right-to-work states, they did not contain a union security clause. Thus, it is clear that a checkoff provision in a contract does not necessarily implement a union security provision. Indeed, dues-check-off provisions can and frequently do exist in collective-bargaining agreements where union security provisions are absent. In a 1995 review of collective-bargaining

[14] Litton concerned the survival of arbitration after contract termination.

[15] Of course, if a union waives its statutory protection against post-expiration termination of a provision that survives the contract, that provision expires when the contract does. The waiver, however, must be clear and unmistakable. LJEB II at 1079 and cases cited therein. The issue of waiver, which is an affirmative defense, Beacon Sales Acquisition, Inc., 357 NLRB No. 75 (2011), has not been raised by Respondent.

agreements, 95 percent were found to contain dues-checkoff provisions while only 82 percent contained union-security provisions. Bureau of National Affairs, Basic Patterns in Union Contracts 97, 14th ed. (Bureau of National Affairs 1995) cited in the dissent in Hacienda I at fn 8. This is because dues checkoff is not a union security device since it does not impose union membership as a condition required for employment. Shen-Mar Food Products, Inc., 221 NLRB 1329, 1330 (1976), enf'd. in relev. part 557 F.2d 396 (4th Cir. 1977). In fact, the check-off authorization in the instant case specifically states it is not contingent on union membership.

Whether in a right-to-work state or not, parties are free to negotiate dues checkoff without union security and vice-versa. They are separate entities with different purposes, and the Act makes no formal relationship between the two devices. Atlanta Printing Specialties, 523 F.2d 783, 786 (5th Cir. 1975). Thus, a contract with both a union security clause and a checkoff clause does not obligate an employee to sign a checkoff authorization. International Union of Electrical, Radio and Machine Workers, Local 601 (Westinghouse Electric Corporation), 180 NLRB 1062 (1970). Further, revocation of checkoff is not tantamount to resignation from the union and resignation from a union does not revoke checkoff authorizations. American Nurses Association, 250 NLRB 1324, 1328, 1331 (1980);[16] Shen-Mar at 1330 (If resignation from a union revoked check off, the periods of revocability on the cards would be rendered meaningless...checkoff does not impose union membership).

Because, as shown above, checkoff clauses in contracts are independent of union security and can stand on their own, they do not implement union security and cannot be

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[16] The Board, in affirming the ALJ, stated that union security and dues checkoff are distinct and separate matters. American Nurses at 1324, fn 1.

subject to the proviso of Section 8(a)(3) requiring a contract. Thus, the Bethlehem Steel rationale that checkoff does not survive contract expiration because it implements a union security clause cannot be correct. If checkoff is not subject to the proviso of 8(a)(3), the only contractual provision governing it is Section 302(c)(4).

Just as Section 8(a)(3) does not reference or even implicate checkoff, Section 302 does not reference or implicate union security. Section 302 was enacted to prevent corrupt dealings by generally prohibiting payments from employers to unions. Frito-Lay, Inc., 243 NLRB 137, 138 (1979); Atlanta Printing at 786. There are certain exceptions to the prohibition, one of which is dues checkoff as provided for in Section 302(c)(4). That section adresses check-off authorizations stating that they must be made pursuant to "a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." The fact that a check-off authorization must be revocable by the employee when the contract terminates indicates that it is not automatically revoked at that time.[17] In fact, Senator Taft, speaking in Congress on May 8, 1947 in favor of checkoff as an exception to the prohibition on payments to Unions, stated that once an employee signs a checkoff authorization, "it may continue indefinitely until revoked..." Legislative History of the Labor Management Relations Act 1947, Volume II at 1311 (National Labor Relations Board 1948). This is obviously what Members Liebman and Pearce had in mind when they stated in Hacienda III at p. 4 that the plain language of 302(c)(4)

[17] Accordingly, an employer does not violate the Act if it voluntarily continues check-off after contract expiration provided, of course, that the employee has not revoked his authorization. Lowell Corrugated Container Corporation, 177 NLRB 169, 172 – 173 (1969), enf'd. 431 F2d 1196 (1st Cir. 1970).

indicates that those employees who do not choose to revoke their authorizations would continue to have dues checked off after contract expired.[18]

Not only do the sections of the Act dealing with union security and check-off not reference or implicate each other, they deal with entirely different types of obligations. The purpose of union security is to stabilize the collective bargaining process by protecting the Union. The checkoff portion of a contract is an administrative convenience, Atlanta Printing at 786; Public Service Co. of Colorado, 312 NLRB 459, 468 (1993), whereby an employer implements a contract between an employee and his union through which the employee voluntarily assigns a portion of his wages to his union, i.e., the check-off authorization. IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322, 327 (1991); Frito-Lay at 137 Further, the impact of the two obligations on employees is vastly different. Union security implicates an employee's very job whereas the absence of a check-off obligation would merely be an inconvenience forcing an employee to make other arrangements for dues payments. In addition, the statute allows an employee to revoke his check-off authorization at provided for times while it gives him no choice in union security. Cameron Iron Works, Inc., 235 NLRB 287, 289 (1978), enf. den. on non-relev. grounds, 591 F2d 1 (5th Cir. 1979); Atlanta Printing at 785 - 787.

Further evidence that the statute allows check-off to survive the expiration of a contract may be found by comparing the language of 302(c)(4) with that of 302(c)(5). The latter exception to prohibited payments addresses an employer's contributions to union trust funds. Such payments are legal provided that, inter alia, "the detailed basis on which (they) are to be made is specified in a written agreement with the employer..."

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[18] The Ninth Circuit in LJEB III used the same rationale in their holding (see p. 11, *supra*).

302(c)(5)(B). Unlike Section 302(c)(5) which requires a writing between a union and an employer,[19] Section 302(c)(4) does not do so. Despite the stricter requirements of 302(c)(5), there is no question that trust fund payments survive the expiration of a contract and may not be unilaterally discontinued absent agreement, bargaining to impasse, or other conditions not present in the instant case.[20] Henry Cauthorne, 256 NLRB 721 (1981), enf'd in relev. part 691 F2d 1023 (D.C. Cir. 1982). It only stands to reason that payments pursuant to check-off, which have fewer restrictions than payments to a trust fund, are permitted by the statute to survive contract expiration.

To summarize, there is no statutory language precluding checkoff from surviving contract expiration.

2. In agreeing to check-off, parties do not give up statutory rights they would otherwise have

The Supreme Court, in Litton at 200, cited with approval the Board decision in Hilton-Davis Chemical Co., 185 NLRB 241 (1970) which, like Litton, concerned arbitration after the expiration of a contract. In finding that there was no requirement to arbitrate a grievance arising after expiration of a contract that included an arbitration clause, the Board in Hilton at 242 stated that an agreement to submit a grievance to binding arbitration was a contractual surrender of the right to final decision and the right to use economic weapons. The duty to bargain after contract expiration did not extend to the relinquishment of a such a right which the Board found to be rooted in that part of Section 8(d) that does not require a party to agree to a proposal or make a concession. As

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[19] That writing need not be a collective bargaining agreement. In fact, nowhere in Section 302 is there a requirement for a collective bargaining agreement. Tribune Publishing Company, 564 F. 3d 1330, 1335 (D.C. Cir. 2009).

[20] Those conditions have to do with a union's majority status and waiver, evidence of which does not exist in this case.

the Supreme Court stated, "no obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." Litton at 200.

In Indiana and Michigan Electric Company, 284 NLRB 53, 54 (1987) the Board distinguished binding arbitration, which does not survive the contract, with non-binding arbitration which does. In the latter case, the parties are not compelled to abide by any decision, and remain free to adhere to their initial positions. Therefore, as there has been no contractual relinquishment of a statutory right, the law forbids a unilateral change in non-binding arbitration after contract expiration unless there has been bargaining to impasse.

As with binding arbitration, there is no requirement to adhere to a no-strike clause after expiration of a contract that contains such a provision. No-strike clauses are excluded from the unilateral change doctrine "except to the extent other dispute resolution methods survive expiration of the agreement"[21] in recognition of the statutory right to strike which is rooted in 8(d)(4) of the Act. Litton at 199 citing Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

A waiver by a union of its statutory right to bargain is yet another example of the holding that the relinquishment of a statutory right does not survive the expiration of a contract. In Ironton Publications, Inc., 321 NLRB 1048 (1996), the Board held that the contractual waiver of a union's statutory right to bargain over merit increases did not survive contract expiration so as to privilege the employer's unilateral grant of merit

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[21] See, Gateway Coal Company v. United Mine Workers of America et al, 414 U.S. 368, 382 (1974) ("Absent an explicit expression of such an intention (to agree to mandatory arbitration but expressly negate any implied no-strike obligation)...the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.").

increases. In the words of the Board, "It is well settled that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intention to the contrary." Further, a waiver of the statutory right to bargain must be clear and unmistakable. It must unequivocally state the mutual intent of the parties to permit employer action with respect to a particular employment term, and does not extinguish the statutory obligation to bargain over terms and conditions of employment not included in the waiver. Provena St. Joseph Medical Center, 350 NLRB 808, 811 (2007).

In view of the law on waiver, it is clear that there are no waivers of the statutory obligation to bargain based on the expiration date of a contract. Honeywell International, Inc. v. NLRB, 253 F.3d 125, 128 (D.C. Cir. 2001) (expiration date of standard contract duration clause can't defeat the unilateral change doctrine otherwise that doctrine would have no meaning).[22] Holding that waiver of an employer's statutory obligation to maintain benefit levels beyond contract expiration is not inferred absent clear and unmistakable evidence, the ALJ in Natico, Inc.,[23] 302 NLRB 668, 685 (1991) explained the difference between contract duration language[24] and a clear waiver that would extinguish the right to bargain by pointing to the language in Cauthorne at 722 ("It is understood and agreed that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension

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[22] As Members Liebman and Pearce stated in Hacienda III at p. 3, contractual wage rates, which clearly survive the contract, are not considered creatures of contract yet "(t)he agreement is the only source of the employer's obligation to provide those particular wages..."

[23] The Natico Board dismissed the allegation on 10(b) grounds but did not disturb the ALJ's reasoning regarding waiver.

[24] The language at issue read, "It is agreed that the pension program effective April 1, 1976 will remain in effect for the term of this agreement..."

Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued.") Similarly, the Court in the earlier Southwestern case at 1114 noted that a waiver of the right to strike during the life of a contract is not a clear and unmistakable waiver beyond the contract term.[25]

Unlike arbitration, no-strike commitments, and clear contractual waivers, check-off does not involve the surrender by a party to the contract of any statutorily guaranteed right. The only surrender of a right is the surrender of the right of the non-party employee to keep his entire salary, subject to the check-off authorization revocation provisions.

3. Conclusion and its application to the instant case

As contractual check-off provisions do not implicate statutory language or the surrender of a statutory right, those provisions, addressing, as they do, a mandatory subject of bargaining, should be found to survive contract expiration whether or not the checkoff provision exists alongside a union security clause. There is no principled rationale for excluding checkoff from the unilateral change rule and any precedent to the contrary should be overturned.[26]

D. If check-off survives contract expiration, Respondent violated Section 8(a)(1) and (5) of the Act.

Assuming the above conclusions to be correct, Respondent, at a minimum, was obligated not to unilaterally cease check-off without giving the Union notice and an

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[25] Thus, although not relevant to the instant case as there is no duration language in Sections C or D of the cba or the check-off authorizations, Acting General Counsel notes that the subsidiary rationale of Bethlehem Steel (that language linking checkoff to the duration of a contract made checkoff contract bound) should be overturned as such language is not a clear and unmistakeable waiver.

[26] Even if that aspect of Bethlehem Steel finding that durational language makes checkoff contract bound is not overturned, there is no durational language in the collective bargaining agreement or the check-off authorizations at issue here that would mandate a contrary finding.

opportunity to bargain over the matter. Western Block Company, 229 NLRB 482, 483 (1977). In the instant case, however, Respondent's obligation went further as the parties were in the midst of negotiations for a renewal collective bargaining agreement.

When parties are engaged in collective bargaining negotiations, an employer's obligation to refrain from unilateral changes extends beyond the duty to provide notice and an opportunity to bargain about a particular subject matter but, rather, encompasses a duty to refrain from implementation at all absent overall impasse on bargaining for the collective bargaining agreement as a whole. Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enf'd. 15 F.3d 1087 (9th Cir. 1994). Bottom Line carved out two exceptions to this duty so as to allow implementation of an action while bargaining is ongoing - when a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action - neither of which defenses has been raised by Respondent in either its Answer or an offer of evidence.

RBE Electronics of S.D., Inc., 320 NLRB 80, 81 - 82 (1995) expanded Bottom Line to find that during negotiations, there are economic exigencies that are not sufficient to excuse bargaining altogether but require prompt action. In those cases, the employer will satisfy its obligation by providing the union with notice and an opportunity to bargain. In such an event, an employer can act unilaterally if the parties reach impasse on the matter proposed for change. The employer, however, must show a need that the particular action be implemented promptly and must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. Respondent, however, did not raise RBE defenses in its Answer. Even had it done so, it did not provide the Union notice and an opportunity to bargain its

cessation of check-off as required by RBE and required by the general rule against unilateral implementation. Western Block, *supra*.

Notice, to be effective must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining. If notice is too short, it amounts to nothing more than informing a union of a fait accompli which is not timely notice. United Parcel Service, 323 NLRB 593, 595 (1997); Schmidt-Tiago Construction Company, 286 NLRB 342, 364 (1987), enf'd. in unpublished decision (10th Cir. 1988).[27] Even when there is an economic exigency, same day notice is not sufficient. Northwest Graphics, Inc., 343 NLRB 84, 93 (2004). Similarly, five days has not been considered a reasonable amount of time for a union to respond. Concord Metal, Inc., 295 NLRB 912, 913 (1989).

Respondent's April 1 e-mail to the Union, though received on the same day (RX 1 and 2), did not give the Union notice and an opportunity to bargain. Rather, that letter was notice of a fait accompli since the April 8 paycheck, which no longer included dues deduction, would have covered, at a minimum, the period beginning April 1, the date of the alleged notice. Moreover, the Fourth Defense in Respondent's Answer (GCX 1s) evidences its belief that it had the right to make a unilateral change without notice and an opportunity to bargain, thus indicating that despite its April 1 letter, it did not intend to negotiate.[28]

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[27] Opportunities for future bargaining after unilateral implementation do not cure the violation. Schmidt-Tiago at fn 5.
klk

[28] Unilateral changes in mandatory subjects of bargaining violate Section 8(a)(1) and (5) whether or not they are unlawfully motivated. MEMC Electronic Materials, Inc., 342 NLRB 1172, 1195 (2004).

In sum, as Respondent made a unilateral change in terms and conditions of employment while negotiating a collective bargaining agreement, pursuant to Bottom Line, it violated Section 8(a)(5) of the Act. Assuming, arguendo, that Respondent had raised and proved an affirmative defense to a Bottom Line violation, Respondent still violated Section 8(a)(5), whether under Litton at 198 (an employer commits an unfair labor practice if without bargaining to impasse it effects unilateral changes in terms and conditions of employment), RBE, or Western Block and similar cases, because it did not give Respondent adequate notice and an opportunity to bargain. Derivatively, Respondent also violated Section 8(a)(1) of the Act. ABF Freight System, 325 NLRB 546, fn3 (1998).

In view of the above, Acting General Counsel asks that the Board find that Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally ceased deducting dues.

V. CONCLUSIONS AND REMEDY

It is submitted that, on the basis of the entire record, a preponderance of the credible evidence supports the Acting General Counsel's position regarding the above-described exceptions. Acting General Counsel, therefore, asks that the Board find that:

- the ALJ's Order Closing the Record is received into evidence as General Counsel's Exhibit 8;
- there is no dispute with regard to the filing and service of the charge;
- there is no dispute with regard to the labor organization status of the Union;
- the parties were engaged in collective bargaining during the months of September 2009 through February 2011;
- absent explicit waiver, the unilateral cessation of dues deductions after a collective bargaining agreement expires is an unfair labor practice and, to the

extent that Bethlehem Steel Company, 136 NLRB 1500 (1962), holds to the contrary, it should be overruled; and

- Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing dues checkoff while negotiating a renewal collective bargaining agreement; or

- Respondent violated Section 8(a)(5) and (1) by failing to give the Union notice or an adequate opportunity to bargain before unilaterally ceasing dues check-off.

Acting General Counsel also asks that the Board issue an Order requiring Respondent to:

- cease and desist from instituting unilateral changes absent impasse in bargaining for a successor cba;

- reinstitute dues check-off for those employees who previously had their dues checked off provided that such employees have not properly revoked their check-off authorizations;

- bargain with the Union regarding check-off until agreement with the Union or an overall impasse in bargaining is reached; and

- pay the Union the dues that should have been checked off as off the first pay period in April 2010.

With regard to the reimbursement remedy, Acting General Counsel notes that it is well-established that the Board requires an employer to reimburse the union for dues checkoff payments that it failed to make under a collective bargaining agreement where employees have individually signed valid authorizations. Plymouth Court, 341 NLRB 363 (2004). Therefore, Acting General Counsel respectfully requests that the Board impose such a remedy noting that the Board will apply a new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at that time so long as this does not work a manifest injustice. SNE Enterprises, Inc., 344 NLRB 673 (2005). In determining whether the retroactive application of a rule will cause manifest injustice, the Board considers the reliance of the parties on

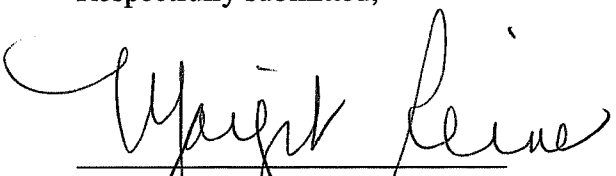
preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act , and any particular injustice arising from retroactive application.

In this instance, the Hacienda/LJEB line of cases make clear that, although Bethlehem has not been overturned, the law regarding checkoff after contract expiration has been in flux since 2002 when LJEB I was decided. The split decision of the Board in Hacienda III and the Circuit Court's decision in LJEB III, made it further evident that Respondent could no longer rely on the Board's decision in Bethlehem. With regard to the effect of retroactivity on accomplishment of the purposes of the Act, Acting General Counsel has set forth in this brief why the requested remedy is in conformity with the language and history of the Act and notes that the Board is accorded considerable authority to structure its remedial orders to effect the purposes of the Act and to order the relief it deems appropriate. Litton at 202. As for any injustice arising from retroactive application of a rule overturning Bethlehem, Acting General Counsel contends that employees cannot realistically be expected to afford payment of over a years' worth of dues. Thus, there is no reasonable way to remedy Respondent's violation other than by having Respondent pay the Union the dues it should have checked off. Acting General Counsel contends that this remedy is not punitive. In Southwestern at 1114, a remedy requiring an employer to pay individuals who would have been employed at the respondent had it not violated hiring hall provisions was considered not punitive because, although it required the respondent to pay two people for every job (the person the company put in the job and the person who should have been put in the job), it was the only reasonable way (if not the only way) to compensate those who had been harmed by

the respondent's refusal to comply with the hiring hall provision. The same rationale is true here.

Dated this 28th day of December, 2011
at New York, New York

Respectfully submitted,



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CERTIFICATION OF SERVICE

Copies of the Acting General Counsel's Exceptions and Supporting Brief to the Board, which has been e-filed with the Board, have been sent, by e-mail, this day, December 28, 2011 to:

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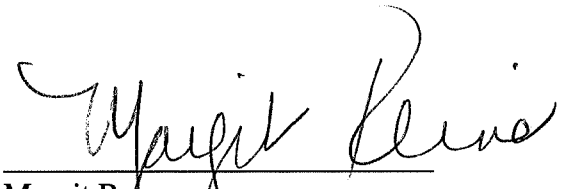

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